STATEMENT OF THE CASE

A. Sean Pasek's case is yet another case of Booker error

On November 21, 2003, a jury found Sean Pasek, along with eight co-defendants, guilty of conspiracy, to manufacture a controlled substance, in violation of 21 U.S.C. § 846. The jury, in connection with its verdict, was not requested to determine the amount of methamphetamine for which Mr. Pasek should have been held accountable. Based on the offense level found by the jury 12 and a criminal history of 1, Mr. Pasek should have received a sentence from 10 - 16 months. On April 12, 2004, however, he received a sentence of 121 months imprisonment; three years supervised release and a $100 special assessment. Pet. App. 4a-12a.

In the sentencing phase, the district court relied on facts presented for the first time in a Pre-sentence Report (PSR). Pet. App. 4a-12a. In the PSR, the Probation Department's calculations and recommendations suggested that Mr. Pasek was responsible for 137 grams of amphetamine. This finding resulted in an offense level of 32. Based on the offense level of 32 and a criminal history of 1, Mr. Pasek's sentence was increased from 10 - 16 months to 121 - 151 months. Although he received the lowest end of the sentence mandated by the Federal Sentencing Guidelines, his sentence was nearly ten times greater than what it would have been if the district court had sentenced him based solely on the jury findings. Pet. App. 13a-38a.

B. Federal Jurisdiction before the Fifth Circuit

On April 14, 2004, Mr. Pasek filed a timely notice of appeal. The jurisdiction of the Fifth Circuit was invoked pursuant to 28 U.S.C. § 1291 because this case was an appeal

from a final judgment entered by the United States District Court for the Northern District of Texas. The jurisdiction of the Fifth Circuit was also invoked pursuant to 18 U.S.C. §§ 3742(a)(1) and 3742(a)(2) because this was an appeal from a final sentence entered by the United States District Court for the Northern District of Texas and one which Sean Pasek submits was imposed in violation of law and as a result of an incorrect application of the Federal Sentencing Guidelines.

The Fifth Circuit affirmed the district court's sentence on April 4, 2005. The Court held that Mr. Pasek, while able to satisfy the first two prongs of the plain-error test in light of its recent decision in United States v. Mares, 402 F.3d 511 (5th Cir. 2005), was not able to meet the third prong of the plain-error test. Specifically, the court found that he was not able to carry his burden of demonstrating that the result would have likely been different had the judge been sentencing under the Booker advisory regime rather than the pre-Booker mandatory regime. Pet. App. 1a-3a.

REASONS FOR GRANTING THE WRIT

I. The Booker decision and the plain-error doctrine.

A. United States v. Booker, 125 S.Ct. 738 (2005).

In Booker, the Supreme Court held that, when a sentencing judge bound by mandatory guidelines increases the sentencing range under the guidelines based on facts not found by the jury or admitted by the defendant, the sentence violates the defendant's Sixth Amendment right to a jury trial. United States v. Booker, 125 S. Ct. 738, 756 (2005). This is sometimes referred to as Booker error. The Court in Booker instructed that its holdings should be applied to all cases on direct review. 125 S. Ct. at 769. When reviewing these

cases, the appellate courts should determine whether Booker error was timely raised. Id. At sentencing, Booker error is timely raised if the defendant argued Apprendi or Blakely error[1] or that the Federal Sentencing Guidelines ("Guidelines") were unconstitutional. United States v. Antonakopoulos, 399 F.3d 68, 76 (1st Cir. 2005). If these objections were not preserved in the lower court, then the appellate court will review the case for plain error. United States v. Olano, 507 U.S. 725, 731 (1993).

B. Plain Error.

As construed in Olano and its progeny, errors not properly preserved are reviewed only for plain error under Rule 52(b) of the Federal Rules of Criminal Procedure. Olano, 507 U.S. at 731. The plain-error test applies even when, as here, the error results from a change in the law that occurred while the case was pending on appeal. See Johnson v. United States, 520 U.S. 461, 467-68 (1997). Plain-error review is governed by the four-part test of Olano, 507 U.S. at 732-36, as articulated in Johnson:

> Before an appellate court can correct an error not raised at trial, there must be (1) error, (2) that is plain, and (3) that affects substantial rights. If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings.

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[1] Blakely and Apprendi were cases that predated Booker and addressed Sixth Amendment violations under mandatory guidelines during sentencing. Blakely v. Washington, 124 S.Ct. 2531 (2004); Apprendi v. New Jersey, 530 U.S. 466 (2000).

520 U.S. at 466-67. All circuits that address Booker agree that Booker error satisfies the first two prongs of the plain-error test. United States v. Coles, 403 F. 3d 764 (D.C. Cir. 2005); United States v. Paladino, 401 F.3d 471, 481 (7th Cir. 2005); United States v. Ameline, 400 F.3d 646, 654-55 (9th Cir. 2005); See United States v. Oliver, 397 F.3d 369, 379-81 (6th Cir. 2005); United States v. Hughes, 396 F.3d 374, 380-81 (4th Cir. 2005). Moreover, these circuits agree that, if the third element is satisfied, then the fourth prong is also satisfied. Id.

Conflict among the circuits arises, however, in the analysis of the third element: whether the Booker error affected the defendant's substantial rights. The circuits need this Court's guidance to resolve this important issue.

Without the Court's guidance, the circuit courts have offered three different ways to analyze the plain-error doctrine's third element. One approach requires the remanding of every Booker error case. Hughes, 396 F.3d 374 at 380-81. Another approach requires the defendant to demonstrate from the record the likelihood that the sentencing judge, under an advisory scheme rather than a mandatory one, would have reached a significantly different result. United States v. Mares, 402 F.3d 511, 522 (5th Cir. 2005). A final method allows the sentencing judge to simply state whether she would have lowered the sentence, if allowed. United States v. Crosby, 397 F.3d 103, 118 (2d Cir. 2005).

II. The Third, Fourth, and Sixth Circuits' approach.

A. The Third, Fourth, and Sixth Circuits' require re-sentencing in all Booker error cases.

The Sixth Circuit held that because defendant's sentence was longer than his sentence would have been absent a Sixth Amendment violation, the sentencing error affected his substantial rights. Oliver, 397 F.3d at 380. Once substantial rights are affected, the third prong of the plain-error analysis is met. Accordingly, defendants sentenced under the previously mandatory regime whose sentences are being challenged on direct appeal may be able to demonstrate plain error and those cases will be remanded for re-sentencing. See United States v. Davis, 397 F.3d 173, 183 (3d Cir. 2005).

The defendant in Hughes was sentenced to a term of imprisonment nearly four times as long as the maximum sentence authorized by the jury verdict. 401 F.3d at 555. This error affected the outcome of the proceeding and he satisfied the third prong of the plain-error analysis. Hughes, 401 F.3d at 556. Thus, his case was remanded to the District Court for re-sentencing. Id.

In Hughes, the Fourth Circuit relied on the standard set forth by the Supreme Court in Kotteakos v. United States, 328 U.S. 750 (1946). Hughes, 401 F.3d at 555. In Kotteakos, the Supreme Court stated that to determine if error affected a defendant's substantial rights the reviewing court must consider what affect the error had upon the outcome of the proceedings, not whether an error-free proceeding would have produced the same result. Kotteakos, 328 U.S. at 763, 764. Therefore, to demonstrate that the error was prejudicial, defendant must show that the error actually affected the outcome of the proceedings. Id. A defendant can make this

showing by demonstrating that he received a sentence longer than the one based only on the jury findings. Hughes, 401 F.3d at 555.

B. Other Circuits Criticize the Third, Fourth, and Sixth Circuits' approach.

The Eleventh Circuit criticizes the Fourth Circuit's refusal to apply the remedial scheme created in Booker. United States v. Rodriguez, 398 F.3d 1291, 1301-1302 (11th Cir. 2005). The remedial scheme allows a sentencing judge to increase a defendant's sentence without error based on facts not proven by the jury when the Guidelines are permissive. According to the Eleventh Circuit, the Fourth Circuit's refusal to incorporate the remedial scheme created by Booker into its prejudice analysis is wrong because it disconnects the error to be remedied on remand from the decision of whether there is to be a remand. Id. Again, relying on Kotteakos, the Fourth Circuit explained that the proper focus is on what actually happened as a result of the error, not what might happen in a subsequent proceeding on remand. Hughes, 401F.3d at 554.

Another criticism of the Third, Fourth, and Sixth Circuits' analysis is that they fail to distinguish between a lawful sentence under an advisory regime and a Sixth Amendment violation under a mandatory regime. Rodriguez, 398 F.3d 1291, 1303-1304. In other words, the courts employing this approach assess error and prejudice as if the pre-Booker mandatory sentencing regime were still in place and as if the error were judicial fact-finding under that regime. Id. This flies in the face of the Supreme Court's remedial order in Booker. Id. The Supreme Court in Booker plainly stated:

> We have never doubted the authority of a judge to exercise broad discretion in imposing a sentence

> within a statutory range.... When a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant. 125 S. Ct. at 750.

III. The First, Fifth, Eighth, Tenth, and Eleventh Circuits' approach.

A. The First, Fifth, Eighth, Tenth, and Eleventh circuits struggle with substantial rights and require the defendant to prove that the result would have been different under advisory Guidelines.

Before finding that substantial rights are affected, the Eleventh Circuit requires the defendant to show that the error actually makes a difference: if it is equally plausible that the error works in favor of the defense, the defendant loses; if the effect of the error is uncertain as to which side, if either, it helped, the defendant loses. Rodriguez, 398 F.3d at 1301. In applying the third prong, the Rodriguez court asked whether there is a reasonable probability of a different result if the guidelines had been applied in an advisory instead of binding fashion by the sentencing judge. Id. The court reasoned that the important function of the third prong of the plain error test is to prevent a remand for additional proceedings where the defendant, who failed to make a timely objection, cannot show that there is a reasonable probability that a do-over would more likely than not produce a different result. See United States v. Dominguez Benitez, 124 S. Ct. 2333, 2340 (2004)(explaining that one reason the plain error third-prong burden on the defendant should not be easy is that one of the policies underlying Rule 52(b) is to "reduce wasteful reversals by demanding strenuous exertion to get relief for unpreserved error").

Relying on the Eleventh Circuit in Rodriguez, the Eighth, Tenth and First Circuits agreed that where the effect of the error on the result in the district court is uncertain or indeterminate –which would require speculation –the appellant has not met his burden of showing a reasonable probability that the result would have been different but for the error. United States v. Pirani, 406 F.3d 543, 553 (8th Cir. 2005). A case-by-case review is necessary to make this showing. Thus, the burden is on the defendant to convince the court on specific facts in the record of a reasonable probability of a different sentence.

Finally, in interpreting the Booker decision, the Fifth Circuit reviewed thoughtful opinions from the First, Second, Fourth, Sixth, Ninth, and Eleventh Circuits. Mares, 402 F.3d at 517. Ultimately, the Mares court agreed with the Eleventh Circuit's approach in Booker error cases. Id. at 521. Thus, the Fifth Circuit analyzed whether the defendant demonstrated that the sentencing judge - sentencing under an advisory scheme rather than a mandatory one - would have reached a significantly different result. Id. But note, in a recent decision, United States v. Pennell, 409 F.3d 240, 246 (5th Cir. 2005), the Fifth Circuit left open the possibility of a limited remand created by the Second Circuit in Crosby.

B. Criticism of the Eleventh Circuit's approach.

According to the Fourth Circuit, the Eleventh Circuit failed to appreciate that, after Booker, there are two potential errors in a sentence imposed pursuant to the pre-Booker mandatory guidelines regime: a Sixth Amendment error and an error in failing to treat the guidelines as advisory. Hughes, 801 F.3d at 553, 554. Further, the Ninth Circuit criticized the Eleventh Circuit's reasoning regarding substantial harm and stated that the more stringent prerequisites imposed by the

plain-error test are designed to encourage a defendant to raise objections during the proceeding rather than strategically withhold an objection as a basis of appeal. United States v. Ameline, 400 F.3d 646 (9th Cir. 2005). On the other hand, the Court stated, to require a defendant to raise all possible objections at trial despite settled law to the contrary would encourage frivolous arguments, impede the proceeding, and waste judicial resources. Id. To preserve error for a client, a conscientious lawyer, under a fair reading of the majority opinion, must now raise a laundry list of objections before the district court, even to those issues deemed by all appellate courts to be well settled. Id. The Ninth Circuit acknowledged that it was unfair to fault the defendant for failing to raise an objection at sentencing based upon a rule that was not announced until after the sentencing was concluded. Id.

Finally, the Second Circuit was critical of the Eleventh Circuit's reasoning regarding substantial harm. The appellate court will be unable to assess the significance of any error by assigning such a burden to a defendant in this context to demonstrate a sufficient probability that the district court would have imposed a different sentence under an advisory sentencing system, even though the law at the time did not require the district court to make such a statement on the record. Crosby, 397 F.3d at 117-118. According to the Second Circuit, resolving unpreserved sentencing error through a "limited remand" would be just and relatively simple and would yield a result that is certain. Id.

IV. The Second, Seventh, Ninth, and D.C. Circuits' approach.

A. The Second, Seventh, Ninth, and D.C. circuits offer a well-reasoned solution to the substantial rights element of the plain-error test.

The Supreme Court has recognized that normally, although perhaps not in every case, the defendant must make a specific showing of prejudice to satisfy the affecting substantial rights prong of the plain-error test. Olano, 507 U.S. at 735. Booker requires a simple, direct remedy to those harmed by the unconstitutional procedure of former times. Paladino, 401 F.3d at 487. The only practical way to determine whether plain error has actually occurred is relatively simple: use a limited remand to ask the district judge what he or she would have done under an advisory sentencing scheme. Crosby, 397 F.3d at 117.

In Crosby, 397 F.3d at 117, the Second Circuit relied on 18 U.S.C. § 3742(f) to support its limited remand approach where the power to remand for re-sentencing necessarily allows a limited remand. To support its approach, the Crosby court stated the following:

> In the overwhelming majority of cases, we simply do not know whether the sentencing judge would have imposed the same sentence had he known that the sentencing guidelines were advisory, rather than mandatory. Crosby, 397 F.3d at 118. As an alternative to presuming prejudice, presuming non-prejudice, venturing to assess prejudice on a case-by-case basis or engaging in wholesale remands in cases where the record is not sufficiently developed to inform the appellate court's plain error analysis, the

Second Circuit elected to remand to the district court. Id.

In addressing this issue, the D.C. Circuit similarly aligned itself with the decisions of the Second Circuit in Crosby, and most particularly with the approach adopted by the Seventh Circuit in Paladino. Coles, 403 F.3d at 771. Similarly, the Ninth Circuit followed the approach adopted by the Second, Seventh, and D.C. Circuits: ask the person who knows the answer, the sentencing judge. Ameline, 400 F.3d 646.

The Seventh Circuit followed Crosby's lead and ruled that, in Booker cases where it is difficult to determine whether the error was prejudicial, the appellate reviewing court should retain jurisdiction of the appeal and order a limited remand to permit the sentencing judge to determine whether he or she would (if required to re-sentence) re-impose the original sentence. Paladino, 401 F.3d at 484. If so, the original sentence would be affirmed against a plain-error challenge provided that the sentence is reasonable. Booker. 125 S. Ct. at 765. The reasonableness requirement is important; the mere re-imposition of the original sentence does not insulate it from appellate review under the new standard. Paladino, 401 F.3d at 484. On the other hand, if the judge states on limited remand that he or she would have imposed a different sentence had he or she known the guidelines were merely advisory, the original sentence will be vacated and remanded for re-sentencing. Id.

B. Criticism of the Second Circuit's approach.

In criticizing the Second Circuit's approach, the Eleventh circuit disapproved of asking the sentencing court's opinion to help decide whether a defendant's substantial rights were affected. Rodriguez, 398 F.3d at 1304-1306. According to

the Eleventh Circuit, plain error cases decided by the Supreme Court place the obligation on the appellate courts - rather than the district courts - to determine the third prong of the plain error test. Id. In addition, the Eleventh Circuit observed; the approach has the potential of producing many needless remands and appeals from those remands. Id. According to the Eleventh Circuit, the Supreme Court sought to avoid these extra steps in the judicial process by requiring appellate courts to answer all prongs of the plain error test. Id.

In response to the Eleventh Circuit's criticism, however, the Ninth Circuit does not agree that the limited remand procedure abdicates its obligation to conduct appellate review. Ameline, 400 F.3d 646. To the contrary, the procedure provides for more accurate appellate review. Id. Without the benefit of the district court's views, the reviewing court would be speculating on a potentially misleading record. Id. For example, the court resumed, district court judges often make remarks at sentencing for purposes other than fact-finding. Id. A district court judge may say some encouraging words for the benefit of the defendant's family, lecture the defendant with a warning, or make stray comments about the Guidelines during sentencing. Id. Such remarks may be made with no intention by the judge that a different sentence would have been imposed under an advisory sentencing scheme. Id. It would be a mistake, the Ninth Circuit stated, to attribute fresh meaning to comments possibly made in a different context. Id. Further, it would be a mistake to infer from a district court's silence that the district court would not have made a different decision under a different sentencing scheme. Id. Therefore, the reviewing court's ability to assess plain error based on the cold record would be significantly impaired. For these reasons, the Ninth Circuit concluded that

seeking the district court's finding on sentencing would allow a more accurate plain error review. Id.

Furthermore, the Ninth Circuit stated that it is also appropriate to direct the district court to proceed with re-sentencing if the Booker error prejudiced the defendant. Id. Identifying legal error and providing direction to the district court on how to cure it is an appellate function. Id. Accordingly, the adoption of a limited remand procedure to effectuate resolution of legal error does not abdicate appellate responsibility in the least. Id. The Ninth Circuit concluded, therefore, that a limited remand procedure is entirely consistent with usual procedures in such circumstances. Id.

V. The Court should apply the limited remand approach adopted by the Second, Seventh, Ninth, and D.C. Circuits to Sean Pasek's case.

A. The Circuits need guidance from this Court on the application of the plain-error test in Booker error cases on direct appeal.

The current state of the law has engendered some confusion. The circuit courts cannot agree what is to be done, and even within circuits, there are numerous and divergent opinions. The result is that the very uniformity in sentencing, which the Court strove to preserve even while dramatically changing the sentencing procedures, is still a distant goal. Perhaps the Court will develop a workable solution in this case and do so in a manner true to the essence of Booker's concern for basic rights of the defendant under the Sixth Amendment. Ameline, 400 F.3d 646.

B. The Fifth Circuit's approach precludes a review of whether substantial rights were affected and, therefore, should not be adopted by this Court.

The Fifth Circuit's analysis does not answer the question of whether Sean Pasek's substantial rights were affected. Moreover, the Fifth Circuit agreed that the Crosby approach has some practical appeal because the remand allows the sentencing judge to give a definitive answer to the question of whether he would have given a different sentence had the Guidelines been advisory. Mares, 402 F.3d at 522. Further, the Fifth Circuit left open for consideration the use of a limited remand. Pennell, 409 F.3d 240, 246 (5th Cir. 2005)(where the court left open the question of whether to remand to the district judge to determine if it would have imposed the same sentence under an advisory Guideline). Perhaps the door was left open because the analysis used by the Fifth Circuit that rejected the Crosby solution as an improper delegation of its authority missed the mark.

Applying the Fifth Circuit's reasoning, it is difficult to assess whether the sentencing error affected Mr. Pasek's substantial rights because the record does not provide how the district court would have proceeded had it known that the Guidelines were advisory rather than mandatory. In very few cases will the record provide a reliable answer because it was very rare for a judge, on the record, to express that view. Ameline, 400 F.3d 646. Pre-Booker, the judge had no reason to express his views of the Guidelines on the record because it would not have made a legal difference. Id.

Alternatively, the only reliable indicator of the prejudice actually suffered by Mr. Pasek would be the presence of or lack of remarks on the record by the sentencing judge, which may or may not indicate whether the judge would give Mr.

Pasek a lower sentence. Relief from error, however, should not depend on the vocal nature of the sentencing judge, Antonak'opoulos, 399 F.3d 68 at 81, especially since, prior to Blakely, there was no reason to provide such information on the record.

C. The Court should adopt the limited remand approach.

Since the Booker decision, there are hundreds of unconstitutional sentences, like Mr. Pasek's, pending on direct review. The Court should not consign the vast majority of these defendants, including Mr. Pasek, to serve illegal terms when there is a plausible and accurate way to resolve the plain error question. In reviewing for plain error, therefore, the Court should apply the analysis used by the Second, Seventh, Ninth, and D.C. Circuits to Sean Pasek's case by adopting the limited remand approach. As described by Judge Posner, the limited remand approach is the middle way between placing on the defendant the impossible burden of proving that the sentencing judge would have imposed a different sentence had the judge not thought the guidelines were mandatory and requiring that all defendants, whose cases were pending when Booker was decided, are entitled to be re-sentenced even when it is clear that the judge would impose the same sentence and the court of appeals would affirm. Paladino, 401 F.3d at 484-85. For these reasons, the limited remand approach is the best approach and should be adopted by the Court and applied in Sean Pasek's case.

A limited remand in this case would enable the Fifth Circuit to more accurately conduct its plain-error review by determining the answer to a question that is the circuit's duty to answer: whether the district court would have given a different sentence had it been prescient enough to foresee

Booker. Crosby, 397 F.3d at 117. The reviewing court need not speculate about the effect of the error; it can simply ask the sentencing judge what he would have done in sentencing Sean Pasek under an advisory sentencing scheme. Crosby, 397 F.3d at 117. If the district court judge states that, under an advisory sentencing scheme, he would have imposed a lighter sentence in Sean Pasek's case, the reviewing court should find that Sean Pasek's substantial rights were affected and that the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. Id. Thereafter, in light of Booker, the Fifth Circuit should, vacate the sentence and remand his case for re-sentencing. Id.

VI. Conclusion

The Booker decision applies to Sean Pasek's case because his case is pending on direct review. See Booker, 125 S. Ct. at 769. Sean Pasek's sentence was imposed on March 15, 2004, without the benefit of the Court's decisions in Booker or Blakely and, thus, he did not preserve his Sixth Amendment objection in the lower court. Therefore, plain-error review is applicable to his case. Olano, 507 U.S. at 732-36. Pet. App. 1a-3a.

In the underlying case, the district court committed a Sixth Amendment error by selecting a sentence dictated by the applicable Guidelines range, which had been calculated on the basis of facts not found by a jury or admitted by Mr. Pasek. Pet. App. 4a-12a. Because Mr. Pasek was sentenced to a longer term than he would have received if the sentence were based on the jury's findings under mandatory guidelines, the court's error was plain. Mares, 402 F.3d at 520-521. In reviewing the case, the Fifth Circuit agreed that the facts in Mr. Pasek's case satisfied the first two prongs of the plain-error test. Pet. App. 3a. In construing Booker, however, the

reviewing court erroneously concluded that Mr. Pasek did not satisfy the third element of the plain-error test because he failed to prove that the sentencing judge would have imposed a lesser sentence under an advisory sentencing scheme. Pet. App. 3a. The record does not reveal how the judge would have ruled under an advisory sentencing scheme. Pet. App. 4a-12a. Why would it if the district court was not required by law at the time to make such a statement on the record? In cases like this one, the most accurate and plausible way to know what the judge would have done in sentencing a defendant under an advisory sentencing scheme is to use a limited remand and simply ask the sentencing judge. Therefore, Mr. Pasek asks this Court to remand his case to the Fifth Circuit, order the reviewing court to use a limited remand and allow the district court judge to state how he would have sentenced Sean Pasek under an advisory sentencing scheme. If the district court judge states that, under an advisory sentencing scheme, he would have imposed a lighter sentence in Sean Pasek's case, the reviewing court should find that his substantial rights were affected and that the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. Thereafter, in light of Booker, the Fifth Circuit should, vacate the sentence and remand the case for re-sentencing.

Respectfully Submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-10377
Summary Calendar

[Filed April 4, 2005]

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.

CRAIG PRITCHETT;
SEAN PASEK,
Defendants-Appellants.

Appeals from the United States District Court
for the Northern District of Texas
USDC No. 4:03-CR-120-4-Y

Before REAVLEY, JOLLY, and HIGGINBOTHAM,
Circuit Judges.

PER CURIAM:*

Craig Pritchett appeals his conviction and sentence for conspiracy to manufacture methamphetamine, and Sean Pasek appeals his sentence imposed for the same offense. We affirm.

With regard to Pritchett's conviction, we hold that the district court's response to the jury's conspiracy query was not plainly erroneous; the district court's reply was responsive to the jury's inquiry, and the reply and the original charge allowed the jury to understand the issue before it.[1] We also hold that the district court did not clearly err in calculating the amount of methamphetamine attributable to Pasek.[2]

Finally, both Pritchett and Pasek argue that their sentences run afoul of the Sixth Amendment. While this case was on direct appeal the Supreme Court decided *United States v. Booker*.[3] As the Sixth Amendment issue was raised in the present case for the first time on appeal, we review only for plain error.[4] Reversible plain error exists only if there is

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

[1] *See United States v. Munoz*, 150 F.3d 401, 418 (5th Cir. 1998).

[2] *See United States v. Bellazerius*, 24 F.3d 698, 703 (5th Cir. 1994), *superceded by statute on other grounds, as stated in United States v. Lightbourn*, 115 F.3d 291, 293 (5th Cir. 1997).

[3] --- U.S. ----, 125 S.Ct. 738 (2005).

[4] *United States v. Mares*, --- F.3d ---, 2005 WL 503715, *7 (5th Cir. 2005).

(1) error; (2) that is plain; and (3) that affects substantial rights.[5] If all three conditions are met we have discretion to correct the error; however, we "ordinarily will *not* do so unless it affects the fairness, integrity, or public reputation of judicial proceedings."[6]

The first two prongs of the plain error test are easily satisfied here.[7] However, in light of our recent decision in *United States v. Mares,* the third prong has not been met.[8] Appellants have not carried their "burden of demonstrating that the result would have likely been different had the judge been sentencing under the *Booker* advisory regime rather than the pre-*Booker* mandatory regime."[9]

AFFIRMED.

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[5] *Id.* at *8 (citing *United States v. Cotton,* 535 U.S. 625, 631 (2002)).

[6] *United States v. Castillo,* 386 F.3d 632, 636 (5th Cir. 2004); *see also Johnson v. United States,* 520 U.S. 461, 467 (1997); *United States v. Olano,* 507 U.S. 725, 732 (1993).

[7] *See Mares,* 2005 WL 503715, at *8 (citing *Johnson,* 520 U.S. at 468).

[8] *See id.* at *8-*9.

[9] *Id.* at *9.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

Criminal Action No. 4:03-CR-120-Y

[April 12, 2004]

UNITED STATES OF AMERICA	)
	)
v.	)
	)
SEAN PASEK	)
	)

TRANSCRIPT OF PROCEEDINGS
(Sentencing Hearing)

BEFORE THE HONORABLE TERRY R. MEANS,
UNITED STATES DISTRICT JUDGE

PROCEEDINGS

[p.2]

(Commencing, 10:45 a.m.)

THE COURT: Let me counsel, please, in the Pasek case.
(Off-the-record discussion at the bench at this time)

THE COURT: I call for sentencing Cause Number 4:03-CR-120-Y, United States of America versus Sean Pasek.

Sean, I never can remember if you say Pasek or Pasek?

DEFENDANT PASEK: Pasek.

THE COURT: Once more?

DEFENDANT PASEK: Pasek.

THE COURT: Pasek. Okay. Thank you.

Mr. Pasek, would you please acknowledge your presence in court for the record by stating your full name?

DEFENDANT PASEK: Sean Kevin Pasek.

THE COURT: And the parties are ready to proceed?

MR. WORLEY: The government's ready, Your Honor.

MR. BRODEN: Defendant's ready, Your Honor.

THE COURT: Mr. Pasek, you appeared before the court on November 21, 2003, at which time a jury found you guilty on Count 1 of a two-count indictment charging you with conspiracy to manufacture methamphetamine and aiding and abetting, in violation of 21, United States Code, Section 846, and 18, United States Code, Section 2.

Mr. Broden, did you and your client receive in a timely manner a copy of the presentence report and the addendum to the [p.3] report?

MR. BRODEN: I was not his counsel at that time, but I know I have received it, and he's received it, and his former counsel filed some initial objections to the presentence report.

THE COURT: And you have reviewed it carefully with him?

MR. BRODEN: I have.

THE COURT: Did the government receive those timely?

MR. WORLEY: We did, Your Honor.

THE COURT: I'll now notify the parties of my tentative findings as to the defendant's objections to the presentence report and the disposition of the defendant's motion for downward departure.

The defendant's objections to the presentence report are overruled for the reasons set out in the addendum, except the objection to Paragraph 26, which is sustained.

Does the government have any objection and/or evidence to those tentative findings?

MR. WORLEY: No, Your Honor.

THE COURT: Does the defendant?

MR. BRODEN: Not to the objections, no, Your Honor.

THE COURT: I will also note that it's my conclusion that the motion for downward departure should be denied.

And I adopt as my final findings of fact the statements of [p.4] fact made in the presentence report, subject to and including changes and qualifications that I made in response to objections.

After having considered the conclusions expressed by the probation officer in the presentence report as to the appropriate guideline calculations and after having considered objections, I determine that those calculations are as follows:

Total offense level 32, Criminal History Category I, imprisonment range 121 to 151 months, and a supervised release range of three years to life, and a fine range of $17,500 to $1 million, plus the cost of imprisonment and supervision.

I have received numerous letters on behalf of Mr. Pasek. I have read them all, and they do play a role in my thinking as to the appropriate sentence in this case.

Mr. Broden, do you wish to make any remarks on behalf of Mr. Pasek?

MR. BRODEN: Your Honor, unless the Court believes it's not necessary, I have two character witnesses that would like to talk to the Court.

THE COURT: Unless I think what?

MR. BRODEN: Unless you don't think that's necessary.

THE COURT: I've read the letters. Let me hear from the government, and then if I think it's necessary, I'll let you know.

MR. BRODEN: Thank you, Your Honor.

[p.5]

THE COURT: Let me first, then, give Mr. Pasek a chance to speak.

Mr. Pasek, do you wish to speak on your own behalf or present any information in mititigation of your sentence?

MR. BRODEN: Your Honor, he told me he would be too nervous to speak to the Court. He and I discussed that.

THE COURT: Is that correct, sir?

DEFENDANT PASEK: Yes, Your Honor.

THE COURT: The defendant having nothing to say, I turn to the government and ask the government if the government wishes to be heard?

MR. WORLEY: No, Your Honor, not at this time.

THE COURT: I'll now state the sentence, but the attorneys will have a final chance to make legal objections before sentence is finally imposed.

MR. BRODEN: Your Honor, I'm sorry.

THE COURT: Yes.

MR. BRODEN: Did you want to hear from the character witnesses?

THE COURT: I'm going to give you the bottom of the guidelines.

MR. BRODEN: Thank you, Your Honor.

THE COURT: Pursuant to the Sentencing Reform Act of 1984, it is the judgment of the Court that the defendant, Sean Pasek, in Cause Number 4:03-CR-120-Y, is hereby committed to [p.6] the custody of the Bureau of Prisons for a period of 121 months. I do not order a fine or cost of incarceration because Mr. Pasek does not have the financial resources or future earning capacity to pay a fine or cost of incarceration. Restitution is not ordered because there is no victim other than society at large.

Upon release from imprisonment, Mr. Pasek shall be on supervised release for a term of three years. While on supervised release, he shall comply with the standard conditions recommended by the sentencing commission and comply with the following additional conditions:

He shall not commit another federal, state, or local crime, not possess illegal controlled substances, not possess a firearm, destructive device, or other dangerous weapon.

He shall report in person to the probation office in the district to which he is released within 72 hours of release from the custody of the Bureau of Prisons.

He shall refrain from any unlawful use of a controlled substance, submitting to one drug test within 15 days of release and at least two periodic drug tests thereafter as directed by the probation officer.

He shall participate in a program approved by the probation office for treatment of narcotic or drug or alcohol dependency that will include testing for the detection of substance abuse, abstaining from the use of alcohol and all other intoxicants [p.7] during and after completion of treatment and contributing to the cost of services rendered at the rate of at least $25 per month.

It is further ordered that he pay a mandatory special assessment of $100.

This sentence is within the guideline range. That range exceeds 24 months. I have selected a sentence of 121 months, which is at the bottom of the guideline range. That sentence will meet the Court's sentencing objectives of punishment, deterrence, and protection of the public. There are no aggravating factors that would warrant a sentence higher in the guideline range.

I've now stated the sentence. I call upon the parties to indicate any legal reason why sentence may not be imposed as stated.

MR. WORLEY: We know of none, Your Honor.

MR. BRODEN: We have none, Your Honor.

We would ask the Court to recommend that Mr. Pasek be allowed to participate in the 500 hour comprehensive drug program, and as the Court can tell by the large number of family members here, there is an interest in keeping in Mr. Pasek incarcerated as close to the Dallas/Fort Worth area as possible.

THE COURT: I'll not make that a formal recommendation. That's the policy of the Bureau of Prisons.

[p.8]

But whenever I make a recommendation, it's routinely ignored because of overcrowding. So his chances of being incarcerated nearby are so-so.

MR. BRODEN: Will the Court make the drug treatment recommendation?

THE COURT: Yes. I do recommend to the Bureau of Prisons that Mr. Pasek be enrolled in the comprehensive drug treatment program.

Mr. Pasek, they probably won't put you in that until late in your period of incarceration.

Mr. Pasek, you have the right to appeal the sentence that I have imposed. You also have the right to apply for leave to appeal in forma pauperis if you're unable to pay the cost of an appeal.

Do you have any questions, sir?

DEFENDANT PASEK: No, Your Honor.

THE COURT: When you get out, I know it's a good ways down the row, but your ability to stay out of prison, both on supervised release as for further violations, is totally dependent on your ability to completely sever yourself from the use of drugs. I know from having before me on a regular basis people who have used methamphetamine, there are few drugs more addictive and harder to stay away from.

I also would say to you, there are few drugs that seem to me to cause mere permanent brain damage and that sort of [p.9] inability to function than methamphetamine. I get more vacant stares in here from people who have been on that than cocaine or heroin or anything else.

So good luck to you. I hope you can manage to take this bitter pill and turn it to some advantage.

You are remanded to the custody of the United States Marshal.

MR. BRODEN: Thank you, Your Honor.

(End of proceedings, 11:00 a.m.)

* * * * *

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter, and that the transcript was prepared by me and under my supervision.

/s/_____ 7-13-14

Ana P. Warren, CSR #2302 Date
U.S. District Court Reporter

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

Criminal Action No. 4:03-CR-120-Y(01)

[January 23, 2004]

UNITED STATES OF AMERICA	)
	)
v.	)
	)
SEAN PASEK	)
	)

PRESENTENCE REPORT

Prepared for: The Honorable Terry R. Means
U.S. District Judge

Prepared by: Sr. USPO Vicki McMillan
Fort Worth, Texas
(817) 978-3633, Ext. 228

Assistant U.S. Attorney: J. Michael Worley
801 Cherry Street, Suite 1700
Fort Worth, Texas 76102
(817) 252-5200

Defense Counsel: (Retained)

William A. Bratton, III
One Quadrangle Tower
2828 Routh Street, Suite 850 LB 10
Dallas, Texas 75201
(214) 871-1133

Sentence Date: March 15, 2004

Offense: Count 1 of the two-count Indictment: Conspiracy to Manufacture Methamphetamine and Aiding and Abetting (21 USC § 846 & 18 USC § 2) – Not more than 20 years imprisonment, $1,000,000 fine, a Class C felony.

Count 2 will be dismissed at the conclusion of sentencing.

Date Offense Concluded: January 12, 2002

Release Status: The defendant was taken into federal custody on September 9, 2003; released on September 10, 2003, on a personal recognizance bond; remanded into custody on November 24, 2003.

Detainers: None

Codefendants: See attached list.

Related Cases: Stacey Stone, Case No. 4:02-CR-002-Y(01); sentenced to 200 months on June 9, 2003.

Date Report Prepared: January 23, 2004

Identifying Data:

Date of Birth:	June 1, 1972
Age:	31
Race:	White/Non-Hispanic
Sex:	Male
Social Security No.:	XXX-XX-XXXX
FBI No.:	466922RB2
U.S. Marshal No.:	30430-177
Texas DL No.:	03620924
TXN PACTS No.:	40477
TX SID No.:	TX06656347
Education:	Four years of college (no degree)
Dependents:	Three
Citizenship:	United States
Mailing Address:	Federal Medical Center - Jail Unit 3150 Horton Road Fort Worth, Texas 76119
Residence Address:	2826 Stanford Irving, Texas
Aliases:	Sean Kevin Pasek

PART A. THE OFFENSE

Charge and Conviction

1. The defendant, **Sean Pasek**, and codefendants Doriana Simone, Ronnie Eric Apple, Craig Pritchett, Collin Stocksen, Gary Lance Youngblood, Phillip Davis, and Heather Petre were named in a two count Indictment filed

in the Northern District of Texas, Fort Worth Division, on April 16, 2003. Count 1 charged the defendants with **Conspiracy to Manufacture Methamphetamine and Aiding and Abetting**, in violation of 21 USC § 846 & 18 USC § 2. Count 2 charged Simone and Stocksen with Manufacturing Methamphetamine and Aiding and Abetting, in violation of 21 USA § 841(a)(1) & (b)(1)(C) and 18 USC § 2.

2. The defendant was arrested on September 9, 2003, by Department of Homeland Security Immigration and Customs Enforcement (formerly U.S. Customs) Special Agent P. Smith in Flower Mound, Texas, without incident. On September 10, 2003, he was brought before U.S. Magistrate Judge Chharles Bleil in Fort Worth, Texas, for an initial appearance hearing. Following the hearing, he was released on a personal recognizance bond with pretrial supervision. U.S. Pretrial Services records revealed the defendant submitted two urine specimens which tested positive for methamphetamine. In addition, the defendant failed to comply with reporting requirements and he had two "stalls" for not submitting urine specimens as directed. Following the guilty verdict on November 24, 2004, the defendant was remanded into custody. He remains in federal custody at the Federal Medical Center - Jail Unit in Forth Worth, Texas.

3. On November 21, 2004, the defendant, accompanied by his court appointed attorney Larry Brown, appeared before U.S. District Judge Terry R. Means. The defendant pleaded not guilty to Count 1 of the Indictment and proceeded to trial. On November 24, 2003, the jury found the defendant guilty. The Court ordered a Presentence Report and scheduled sentencing for March 15, 2004.

4. On December 8, 2003, attorney William A. Bratton, III was retained by the defendant, and substituted counsel.

5. Based on the defendant's offense of Conspiracy to Manufacture Methamphetamine, 18 USC § 4042 requires probation officers to notify the State Attorney General and local law enforcement when a change of residence to another local law enforcement jurisdiction occurs while under supervised release supervision.

The Offense Conduct

6. The information presented in this section of the Presentence Report was obtained from the Criminal Complaint, Indictment, Factual Résumé, and investigative reports prepared by U.S. Customs, as well as investigative material provided during the prosecution of related case, Stacey Stone. All information contained in the Presentence Report was corroborated through interviews with Homeland Security Special Agent P. Smith. The information contained herein is based upon evidence considered reliable by this probation officer.

7. On December 7, 2001, a customs inspector at the Dallas-Fort Worth International Airport in Irving, Texas, mail facility received a telephone call from a woman who identified herself as "Sarah Martinez." The woman asked the inspector to locate several parcels she was expecting. The woman described the parcels as containing various pills composed fo pre-natal vitamins, herbs, and vitamin B-12. The inspector took the woman's telephone number and advised her he would call her back after he determined their

location. The inspector subsequently located four parcels, sent from Ontario, Canada, addressed to "Sarah Martinez" at 829 Overfill Drive, in Hurst, Texas. Each parcel was labeled in compliance with FDA standards; the contents of each being "Pseudoephedrine HCL Pharm. Grade 73mg 200 Tablets." However, the inspector was suspicious since the woman reported the packages contained vitamins and herbs; not pseudophedrine. Under the authority granted to U.S. Custom Services (Customs), the inspector opened the parcels and confirmed they contained a total of 198 bottles, each containing 200 tablets of pseudophedrine, a Drug Enforcement Administration (DEA) List I chemical. The parcels weighed a total of 16 pounds, and contained approximately 36,900 dosage units (tablets). From training and experience, the inspector knew pseudoephedrine was a necessary ingredient used to manufacture methamphetamine in clandestine laboratories. Based on conflicting description of the parcels' contents, and the large among of dosage unites, the inspector referred his findings to Customs enforcement agents for further investigation.

8. Subsequently, Special Agent Smith initiated a follow-up investigation of the parcels' intended address, 829 Overhill Drive, Hurst, Texas, and a background check of the parties associated wit the address. Special Agent Smith determined the address was occupied by Stacey Stone and his mother, Peggy Stone, the owner and primary resident. No information was found on the addressee, "Sarah Martinez." However, it was determined Stone had been the subject of numerous law enforcement contacts since 1985, which included a conviction for Aggravated Assault on a Peace

Officer. At the time of Agent Smith's investigation, Stone was under electronic monitoring pending a methamphetamine manufacturing offense. Based on his findings, Special Agent Smith initiated a plan to execute a controlled delivery of one of the parcels and executed a search warrant at 829 Overhill, Hurst, Texas. Agents from Alcohol, Tobacco, and Firearms (ATF), DEA, U.S. Postal Service, and local law enforcement agencies assisted in the investigation.

9. On December 11, 2001, a postal inspector, acting as a mail carrier, delivered a parcel containing a quantity of the pseudeophedrine to Stacey Allen Stone at 829 Overhill Drive, Hurst, Texas. Stone signed for the package. A short time later, a beeper installed on the package indicated that the package had been opened. Stone's girlfriend, Jade Kuhn, pulled into the driveway, called Stone from her cell phone, and warned him that she suspected law enforcement surveillance units were parked nearby the residence. Stone placed all the pseudoephedrine bottles into a backpack, and woke up his mother's boyfriend, Peter Anderson, to tell him to look after his (Stone's) daughter. At that moment, agents converged on the residence to execute the search warrant. Stone fled out the back door and encountered agents. Stone was detained while agents conducted a search of the residence. The only individuals present during the search were Stone, Peter Anderson, and Stone's infant daughter.

10. A functional, but non-operational, clandestine methamphetamine laboratory was discovered in the garage of Stone's residence. DEA agents located several lab components which included filters, hoses,

flasks, glass jars, funnels, and plastic bags. Several hazardous materials, toxic waste, and chemical precursors were also identified including methamphetamine oil, red phosphorus, muriatic acid, acetone, naphtha, lighter fluid, and iodine crystals. DEA agents maintained control over the hazardous materials until an environmental management disposal crew arrived to remove the hazardous materials. Special Agent Smith advised Stone's bedroom floor was visibly covered with red phosphorous powder, a highly flammable and toxic chemical used in the "cooking" process. Special Agent Smith further advised the chemicals and residue found in Stone's residence were extremely hazardous to humans and the environment.

11. In addition to the methamphetamine manufacturing materials, the offense involved 198 bottles of 200 count, 60 milligram tablets, totaling 2,376 grams of ephedrine. Furthermore, Stone admitted to agents he had disposed of an unknown quantity of methamphetamine oil into the toilet just before he fled from the residence. Agents also recovered three loaded firearms from Sone's residence; two of the three firearms were loaded in Stone's bedroom.

12. Further investigation determined Stone had been manufacturing methamphetamine since before September 18, 2000. In a subsequent debriefing interview, pursuant to a USSG § 1B1.8 cooperation agreement, Stone reported Heather Petre used the identity of "Sarah Martinez" when she contacted the Dallas-Fort Worth International Airport mail facility to inquire about the pseudoephedrine shipment. Stone also reported Petre was associated with Phillip Davis;

and they both assisted Stone with the importation of pseudoephedrine for use in methamphetamine manufacturing. However, it was later determined that Stone was not truthful concerning the identity of the female who used the alias "Sarah Martinez," Special Agent Smith determined that Stone's girlfriend, Jade Kuhn, was the one who contacted inspectors and used the name "Sarah Martinez," and furthermore, that Stone was untruthful in an effort to protect Jade Kuhn.

13. Stone revealed he sent Doriana Simone to the U.S. Post Office in Hurst, Texas to purchase money orders to pay for the shipment, because he was under electronic monitoring by state authorities. On occasion, Simone used the alias name "Sarah Martinez;" however, the true "Sarah Martinez" was a friend of Simone's and not aware of the criminal activity.

14. In addition, Stone provided information as to the history of his criminal enterprise. Specifically, how Simone initiated orders of pseudoephedrine, how orders were paid for, ultimate end users and various other criminal elements associated with the clandestine manufacture of methamphetamine.

15. As a result of the aforementioned controlled delivery of pseudoephedrine to Stone, Special Agent Smith, with the assistance of other law enforcement agencies, initiated an investigation which led to the following information: On September 18, 2000, officers from the Keller, Texas Police Department attempted to serve an arrest warrant on Stacey Stone and Doriana Simone at Stone's residence, 2078 Paint Pony, Keller, Texas. Stone and Simone were ultimately arrested

during a traffic stop near the residence. During a search of Stone's vehicle, officers seized the following items: a plastic bag which contained a crystalized powder substance; $2,611 cash; several types of pills; and, a glass jar with a red powder in the bottom of the jar which omitted a strong chemical odor. Pasek was observed by officers leaving the residence and stopped for a traffic violation and released. Stone reported to Special Agent Smith that the laboratory equipment seized from 2078 Paint Pony in Keller, Texas belonged to Pasek. Stone further reported he had learned to manufacture methamphetamine from Pasek.

16. After the arrest of Stone and Simone on September 18, 2000, Keller police officers executed a state search warrant at the Paint Pony address in Keller. Inside the garage of the residence, officers found a large metal toolbox which contained the following items: a tupperware container which contained red phosphorus; plastic bags and coffee filters; large containers with a milky substance and powder settled to the bottom which agents believed were pseudoephedrine tabs dissolving; over 600 grams of a rock substance; numerous small white rock like substances in various containers; eight small bottles of Iodine crystal; six large bottles of Iodine crystals; one can labeled Naptha and one empty can of Naptha; filter masks; electric burner; electric fan; rubbing alcohol; four glass beakers; and, assorted paraphernalia hoses, large syringes with red powder residue. Inside the residence in a bedroom, officers found the following: four bottles Twin Pseudo; six bottles of prescription Pancof-HC (listed ingredient is pseudoephedrine); one book labeled "How to Make Methamphetamine" and one internet article on methamphetamine production;

and, a digital scale with a $100 bill inside; several plastic baggies. In the kitchen of the residence, officers found the following items: a Mason jar with liquid' Dewalt drill with a long mixer attachment, white powder reside on the shaft; glass bowl with a small quantity of white powder; and, notes and receipts for nasal decongestant.

17. Officers forwarded the suspected chemicals to Forensic Consultants for laboratory analysis. On December 5, 2000, the list of evidence seized by the Keller Police Department from the Paint Pony address was analyzed by Forensic Examiner Thomas R. Ekins and Laboratory Director Max Courtney. The results of the examination is as follows: red phosphorus; .18 gram of methamphetamine oil - extracted from residue; acetone; 480.4 grams of liquid which contained 16% pseudoephedrine - dissolved in methanol; 472.6 grams of material containing 7% pseudoephedrine by weight; iodine; pseudoephedrine tablets; a liquid with limited quantity of Dihydrocodeinone, combined with chlorpheniramine and pseudoephedrine; 173.2 grams of liquid in aqueous layer containing 4% methamphetamine by weight; hydrocarbon mixture consistent with Naptha; isopropyl alcohol; and .01 gram of powder containing methamphetamine. Based on his knowledge and experience, Max Courtney determined that three of the items contained respectively 173 grams, 33 grams, and 29 grams of pseudoephedrine, for a total quantity of 235 grams. According to Mr. Courtney, using a range of conversion ratios of from 50% to 90%, the quantity of pseudoephedrine could be converted to 137 to 211 grams of actual methamphetamine. In addition,

Mr. Courtney reported there is sufficient iodine and red phosphorus present to complete the conversion.

18. Following his arrest, codefendant Phillip Davis reported to agents the Stone offered he and Heather Petre a place to stay at the house on Paint Pony in Keller, Texas. While at the Paint Pony address, Davis observed laboratory components in Stone's bedroom, and he learned that Stone was attempting to perfect his methamphetamine manufacturing process. Petre introduced Stone to Pasek and she advised Stone that Pasek could teach him how to cook methamphetamine. Davis admitted he and Petre received methamphetamine twice from Pasek and because Pasek trusted Petre he would "front" the methamphetamine to them. According to David, he and Petre were later arrested and while they were in custody, Pasek became more involved with Stone. When Davis and Petre were released from jail, they re-initiated contact with Pasek and he continued to supply them with methamphetamine. Davis revealed that during February or March 2001, he tried to learn how to cook methamphetamine and he consulted with Pasek over the telephone, and Pasek came to Davis' apartment one time to help with a cook. Pasek showed Davis how to "shake" the solution in order to powder the methamphetamine. In April or May 2001, Davis and Pasek had a "co-cook" at Davis' apartment. According to Davis, he obtained red phosphorus from Pasek on occasion and Pasek was getting components for producing methamphetamine from David Bruce Johnson (unindicted). Davis further admitted he and Pasek each obtained pound quantities of red phosphorus from Stone on two occasions. Davis also revealed he cooked methamphetamine with Pasek on

15 occasions. Special Agent Smith asked Davis if he had any knowledge regarding the laboratory equipment seized from the Paint Pony residence in Keller, Texas, and Davis replied the trailer containing the equipment belonged to Pasek.

19. On September 9, 2003, Special Agent Smith arrested Pasek at his residence in Flower Mound, Texas. After being advised of his rights, Pasek agreed to be interviewed and to a limited search of his residence. During the interview, Pasek identified a brown piece of luggage that Pasek claimed contained the only lab component that remained on the premises. Pasek consented to a search of the garage area, and during the search, a glass beaker, consistent with those used in manufacturing methamphetamine was located within the brown piece of luggage. No additional evidence was obtained from the search.

Victim Impact

20. There is no victim of this offense other than society at large. However, pursuant to 21 USC § 853(q), the Court shall order the defendant to reimburse the United States or local government concerned for the cost incurred by the United States or local government for the cleanup associated with the manufacture of amphetamine or methamphetamine. The government is not aware of any cost associated with the cleanup of Stone's clandestine laboratory in Keller, Texas. Therefore, restitution is not applicable.

Adjustment for Obstruction of Justice

21. There is no evidence the defendant obstructed justice during the investigation or prosecution of this case.

Adjustment for Acceptance of Responsibility

22. On December 12, 2004, this officer interviewed the defendant at the Federal Medical Center - Jail Unit in Fort Worth. His attorney was also present. The defendant, acting on the advice of his attorney, declined to discuss the offense. The defendant intends to appeal his guilty verdict.

23. The defendant put the government to its burden of proof at trial by denying essential factual elements of guilt. The probation officer has no information that the defendant accepted responsibility for his offense prior to proceeding to trial. Therefore, no adjustment will be made for acceptance of responsibility pursuant to USSG § 3E1.1, comments. (n.2).

Offense Level Computations

24. The November 1, 2002, edition of the Guidelines Manual was used in this case.

25. Base Offense Level: The base offense level for a violation of 21 USC § 841(a)(1) is found in USSG § 2D1.1. Pursuant to USSG § 2D1.1(a)(3), the base offense level is determined by using the Drug Quantity Table set forth in subsection (c). The quantity of pseudoephedrine seized from the Keller residence could be converted to 137 to 211 grams of actual methamphetamine; therefore, the defendant is

accountable for 137 grams of actual methamphetamine. Pursuant to USSG § 2D1.1(c)(4), at least 50 grams, but less that 150 grams of methamphetamine (actual) establishes a base offense level of 32. 32

26. Specific Offense Characteristic; Pursuant to USSG § 2D1.1(b)(5)(B), if the offense involved the manufacture of methamphetamine; and created a substantial risk of harm to human life or the environment, increase by 3 levels. +3

27. Victim Related Adjustment: None. 0

28. Adjustment for Role in the Offense: None. 0

29. Adjustment for Obstruction of Justice: None. 0

30. Adjustment for Acceptance of Responsibility: None. 0

31. Total Offense Level: 35

PART B. THE DEFENDANT'S CRIMINAL HISTORY

Juvenile Adjudications

32. None.

Adult Criminal Convictions

33. Date of Arrest
1/4/2001 (Age 28)

Conviction/Court
Possession of a Controlled Substance MA0134252 Dallas County Criminal Court No. 5 Dallas, Texas

Date Sentence Imposed/Disposition
2/12/2002: Pleaded guilty. Sentence suspended, placed on 10 months deferred adjudication probation. 12/10/2002: Motion to Adjudicated filed. 1/6/2003: Motion and probation dismissed.

Guideline/Points
USSG § 4A1.1(c) 1

The defendant was represented by attorney.

According to the Irving Police Department arrest report, on January 24, 2001, the defendant was driving a vehicle which was stopped pursuant to a traffic violation. The defendant gave police officers permission to search the vehicle. The search revealed a prescription containing four tablets of Trazodone HCI which belonged to Rebecca Hardy.

The Dallas County Clerk's Office was unable to located a complete file, therefore, no additional information is available.

Criminal History Computation

34. The adult criminal convictions above result in a criminal history score of 1 and a Criminal History Category of I. USSG Ch.5, Pt.A.

Other Criminal Conduct

35. None.

Pending Charges

36. None.

Other Arrests

37. None.

PART C. OFFENDER CHARACTERISTICS

Personal and Family Data

38. The following information was provided by the defendant and verified by his mother, Judy Pasek. In addition, U.S. Pretrial Services records were reviewed which contained similar biographical information.

39. Sean Pasek was born June 1, 1972, in Irving, Texas, to the union of John and Judy (nee Grider) Pasek. He is the younger of two children born to this union.

40. The defendant was reared in Irving, Texas, in a close-knit, two parent home, where both parents worked. According to the defendant, he had good, stable parents, who met all of his needs, and his childhood was devoid of any form of abuse or neglect.

41. Ms. Pasek advised she and the defendant's father have been married 35 years, and they resided in the same home since the defendant was 6 months old. Mr. Pasek has been employed by Sasib North American,

Incorporated, in Plano, Texas, for 15 years as a systems analyst. Ms. Pasek is currently a homemaker. The defendant's older sister, Michelle, co-owns a child care center in Lewisville, Texas.

42. Ms. Pasek revealed the defendant was an easy child to raise, he followed their rules, abided by their curfew time, and he was never in any trouble. In high school, the defendant participated in sports and graduated near the top of his class; to her knowledge, the defendant never abused alcohol or drugs. Furthermore, he was an active participant in a high school organization referred to as "Students Against Alcohol and Drug Abuse." According to Ms. Pasek, the instant offense has been a complete shock to her and the defendant's father, and it has been difficult to accept. However, they remain supportive of the defendant.

43. At the time of his arrest for the instant offense, the defendant lived with his common-law wife, Kristen Barley, and their infant son, at 1215 River Oaks Drive in Flower Mound, Texas. The defendant and Kristen have lived together approximately eight years. One child Matthew, currently age 11 months, was born to this union. Matthew will turn 1 year old on January 23, 2004. Since the defendant's conviction. Kristen has moved to her parents home in Levelland, Texas.

44. The defendant's family members are identified as follows:

Name	Relation	Age	Residence
John Pasek	Father	58	2826 Stanford Irving, Texas
Judy Pasek	Mother	56	2826 Stanford Irving, Texas
Michelle Pasek	Sister	33	1107 Kingston Lewisville, Texas

Physical Condition

45. The defendant is 6 feet tall, and weighs 220 pounds. He has blue eyes and brown hair. The defendant reported no identifiable marks or scars.

46. The defendant advised he is blind in his left eye. In 1998, the defendant underwent a series of laser eye surgeries to remove a cataract which had formed as a result of a metal fragment which had lodged in his eye. The defendant reported the surgery was conducted by Dr. Shaski Dharma in Irving, Texas.

47. The defendant described his current physical health as excellent. He is not currently taking any prescription medication.

Mental and Emotional Health

48. The defendant reported no history of mental illness or mental instability. The investigation did not reveal evidence to suggest otherwise.

Substance Abuse

49. The defendant acknowledged a history of substance abuse. The defendant revealed he first used methamphetamine in 2000. According to the defendant, he was working three jobs and the stress of trying to maintain his employment led to his sue of methamphetamine. The defendant advised his use of methamphetamine was during pretrial supervision.

50. The defendant advised he could benefit from substance abuse counseling while he is incarcerated.

Educational and Vocational Skills

51. School transcripts revealed the defendant entered the University of North Texas in Denton, Texas, in the fall of 1994. He received 63 hours by transfer credit; 15 hours from Texas A&M; 39 hours from Blinn College; and 9 hours from Dallas County Community College. The defendant withdrew from school on February 26, 1998; he had completed 125 semester hours.

52. The defendant attended Texas A&M University in College Station, Texas, from September 1991 until December 1992, according to the Registrar's office. He completed 15 semester hours.

53. The defendant graduated from McArthur High School in Irving, Texas, on June 1, 1991. He was ranked 127 in a class of 402 students and he had grade point average of 5.84.

Employment Record

54. The defendant has been in custody since November 24, 2003.

55. The defendant reported he was employed by Quick Sall Concrete in Lewisville, Texas, from 2000 until 2003, as a foreman and he earned approximately $30,000 per year. This business filed for bankruptcy and was subsequently closed. This information was verified by the defendant's mother.

56. The defendant was employed by Dunn Services in Argyle, Texas, from 1998 until 1999, as a machinist and he earned $8 per hour. The defendant quit this job to seek employment with Quick Sall Concrete.

57. The defendant advised he was employed by Alloy and Elements in Irving, Texas, on a part time basis from 1988 until 1999, as a welder. The defendant reported he worked during the summer months and winter breaks from school, and he could base his work hours around his school schedule. This business closed after the owner died. This information was verified by the defendant's mother.

Financial Condition: Ability to Pay

58. On December 12, 2003, the defendant submitted a Personal Financial Declaration to this office which listed no income, assets, or liabilities. A credit report obtained from CSC Credit Services in El Paso, Texas, revealed three credit accounts which have been closed and delinquent amounts "charge off" by the credit company.

59. The defendant has been incarcerated since November 24, 2003. He does not have the financial resources or future earning capacity to pay a fine within the guideline range.

PART D. SENTENCING OPTIONS

Custody

60. Statutory Provisions: The maximum term of imprisonment that may be imposed is 20 years. 21 USC §§ 846 & 841(a)(1) & (b)(1)(C).

61. Guideline Provisions: Based on a **Criminal History Category of I and a Total Offense Level of 35, the Guideline Range of Imprisonment is 168 to 210 months**, which is in Zone D of the Sentencing Table. The minimum term shall be satisfied by a sentence of imprisonment. USSG § 5C1.1(f).

Impact of Plea Agreement

62. There was no Plea Agreement. The defendant was convicted by jury verdict.

Supervised Release

63. Statutory Provisions: The Court, in imposing a sentence to a term of imprisonment for a felony or a misdemeanor, may include as part of the sentence a requirement that the defendant be placed on a term of supervised release after imprisonment, except that the Court shall include as a part of the sentence a requirement that the defendant be placed on a term of supervised release if such a term is required by

statute. The statute requires a term of supervised release of at least three years. 21 USC § 841(a)(1) & (b)(1)(C).

64. Guideline Provisions: USSG § 5D1.1 provides that the Court shall order a term of supervised release to follow imprisonment when a sentence of imprisonment of more than one year is imposed, or when required by statute. The defendant is convicted under a statute that requires a term of supervised release of at least three years, but not more than Life. Therefore, the guideline range for supervised release is three years, but not more than Life. USSG § 5D1.2(b).

Probation

65. Statutory Provisions: The defendant is eligible for probation by statute. For a felony, the authorized term of probation is not less than one year, or more than five years. 18 USC § 3561(c)(1).

66. Guideline Provisions: The minimum term of imprisonment in the applicable guideline range is eight months or more, therefore, the defendant is not eligible for probation. USSG § 5B1.1, comment. (N.2).

Restitution

67. Restitution is not applicable because the defendant was convicted of 21 USC § 846 which is excluded from law.

Fines

68. Statutory Provisions: The maximum fine that may be imposed is $1,000,000. 21 USC §§ 846 & 841(a)(1) & (b)(1)(C). The defendant shall pay interest on any fine of more than $2,500 unless the fine is paid in full before the fifteenth day after the date of judgment. If the Court determines that the defendant does not have the ability to pay interest on a fine that may be imposed, the Court may waive the requirement for interest. 18 USC § 3612(f).

69. A special assessment of $100 is mandatory. 18 USC § 3013(a). The defendant has not paid the special assessment as of the date of this report was disclosed.

70. Guideline Provisions: The fine range is $20,000 to $1,000,000. USSG § 5E1.2(c)(3) & (4).

71. Subject to the defendant's ability to pay, the Court shall impose an additional fine amount that is at least sufficient to pay the cost to the government of any imprisonment, probation or supervised release ordered, unless the Court finds it is clearly unreasonable to do so. USSG § 5E1.2(d)(7). The most recent advisory from the Administrative Office of the U.S. Courts dated June 11, 2003, reflects the average per capita costs in Federal Bureau of Prisons operated facilities during 2002:

Federal Prison Facilities

Daily: $61.69
Monthly: $1,876.61
Annually: $22,519.32

Community Corrections Centers

Daily: $48.51
Monthly: $1,475.67
Annually: $17,708.09

The Budget Division of the Administrative Office of the U.S. Courts provides the following per capita supervision costs:

Supervision

Daily:$9.31
Monthly:$283.23
Annually:$3,398.79

Supervision costs do not include the costs for drug/alcohol treatment and testing, mental health treatment, or the costs associated with electronic monitoring.

Denial of Federal Benefits (The defendant was not admonished about this sentencing option.)

72. Statutory Provisions: The Court may deny the eligibility for certain benefits as defined in 21 USC § 862.

73. Guideline Provisions: The Court, pursuant to 21 USC § 862, may deny the eligibility for certain benefits to

any individual convicted of distribution or possession of a controlled substance. USSG § 5F1.6.

PART E. FACTORS THAT MAY WARRANT DEPARTURE

74. At this time, there are no known mitigating or aggravating factors that would warrant a departure from the prescribed guideline range.

Respectfully Submitted,

/s/_____
Vicki McMillan
Senior U.S. Probation Officer

VM
January 23, 2004

APPROVED:

/s/_____
Barry Case
Supervising U.S. Probation Officer